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No. 91-88

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

MALCOLM A. SUSSEL,

Petitioner,

v.

CITY AND COUNTY OF HONOLULU, and FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu; D.G. "ANDY" ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu; LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of Civil Service of the City and County of Honolulu; GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu; JEREMY HARRIS, in his official capacity as Managing Director of the City and County of Honolulu; CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF HONOLULU; HIROO W. MIYAGI; ERNEST K. DIAS; MOISES L. TACAZON; PATRICIA K. SALSBURY; ISABEL M. TAGALA; and BEVERLY NAGY, in their official capacities as Commissioners of the City and County of Honolulu,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

I. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

II. STATEMENT OF THE CASE 3

A. Relevant Facts 4

1. Petitioner's Reallocation 4

2. Petitioner's Civil Service And State Court Actions 5

3. Federal Court And Remanded Proceedings 7

III. REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI 8

A. The Controversy Is Based Upon County Or State Law Issues And Presents No Federal Questions Of Substance. 8

B. There Is No Conflict Regarding The Application Of *Mt. Healthy's* "But For" Test And, In Any Event, There Was No Political Discrimination. 9

C. Petitioner Did Not Preserve Any Issue Regarding Denial Of Due Process In The 1985 Civil Service Hearing And, In Any Event, He Would Not Have Prevailed In The 1985 Hearing. 13

PAGE

D. Petitioner's Claims Regarding The Alleged Unreasonableness Of Delay In The Civil Service Process Merely Involves A Review Of Findings Of Fact Which Would Be Of No Importance Except To the Litigants Themselves. 15

E. There Is No Basis For A Grant Of Certiorari On The Issue Of Deprivation Of A Liberty Interest As Petitioner Specifically Elected Not To Appeal the Judgment Against Him On His Defamation Claim, And, In Any Event, Petitioner Was Neither Stigmatized Nor Deprived Of A Liberty Interest By Respondents' Statements And Actions. 17

F. Petitioner Has No Substantive Due Process Claims. 19

IV. CONCLUSION 19

APPENDICES

Appendix 1 — Opinion of the Supreme Court of the State of Hawaii in *Malcolm A. Sussel v. City & County of Honolulu Civil Service Commission, et al.*, December 19, 1989 ..... 1a

Appendix 2 — Scheduling Order of the United States Court of Appeals for the Ninth Circuit in *Malcolm A. Sussel v. City & County of Honolulu, et al.*, August 24, 1989 ..... 11a

TABLE OF AUTHORITIES

PAGE

CASES

Abeyta v. Town of Taso, 499 F.2d 323 (10th Cir. 1974) 18

Bell v. Department of Health and Human Services, 483 So.2d 945 (La.1986) 9

Board of Regents v. Roth, 408 U.S. 564 (1972) 17, 18

Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d 1093 (9th Cir. 1981), *cert. denied* 455 U.S. 948 (1982) 18

Branti v. Finkel, 445 U.S. 507 (1980) 12

Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972), *cert. denied* 411 U.S. 972 (1973) 18

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 16

Cordero v. De Jesus-Mendez, 867 F.2d 1 (1st Cir. 1989) 13

Daniels v. Williams, 474 U.S. 327 (1986) 8

Elrod v. Burns, 427 U.S. 347 (1976) 11, 12

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) 10

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 8

Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236 (1st Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987) 12, 13

Lake Michigan College Federation of Teachers v. Lake Michigan Community College, 518 F.2d 1091 *cert. denied*, 427 U.S. 904 (1976) 18

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) 9, 10

NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981) 15

Paige v. Harris, 584 F.2d 178 (7th Cir. 1978) 18

PAGE

Parratt v. Taylor, 451 U.S. 527 (1981) 8
Peters v. Hobby, 349 U.S. 331 (1955) 18
Pullman v. Railroad Commission, 312 U.S. 496 (1941) 8
Rudolph v. U.S., 370 U.S. 269, reh. den. 371 U.S. 854 (1962) 15
Rutan v. Republican Party of Illinois, 110 S.Ct. 2729 (1990) 11
Siegert v. Gilley, 59 U.S.L.W. 4465 (May 23, 1991) 17, 18, 19
Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508 (1924) 15
Tomczak v. City of Chicago, 765 F.2d 633 (7th Cir.), cert. denied, 474 U.S. 946 (1985) 12, 13
U.S. v. Salerno, 481 U.S. 739 (1987) 19
United States v. Lovett, 328 U.S. 303 (1946) 18
Wieman v. Updegraff, 344 U.S. 183 (1952) 18
Wisconsin v. Constantineau, 400 U.S. 433 (1971) 18
Wolf v. Weinstein, 372 U.S. 633, *reh. den.* 373 U.S. 928 (1963) 8

STATUTES

Hawaii Revised Statutes, Section 128-3(d) 2

1973 REVISED CHARTER OF THE CITY AND COUNTY OF HONOLULU (1984 Edition)

Section 13-103.(a) 3, 15
Section 13-103(h) 3, 15
Section 6-310.1 ..... 3, 15
Section 6-104 ..... 2, 12

REGULATIONS

Revised Rules of the Civil Service Commission, Rule 1.1-A.1.6.e. 3, 15

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

MALCOLM A. SUSSEL, Petitioner

v.

CITY AND COUNTY OF HONOLULU, et al., Respondents[1]

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents FRANK F. FASI, D.G. "ANDY" ANDERSON, LORETTA K. FUKUDA, and GEORGE KEKUNA respectfully pray that the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit be denied.

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[1]All parties in this proceeding are listed in the caption on the cover of this Joint Brief In Opposition To Petition for Writ of Certiorari. Respondent CITY AND COUNTY OF HONOLULU has filed a separate Brief In Opposition to Petition for Writ of Certiorari.

I. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED[2]

In addition to the constitutional and statutory provisions set forth in Petitioner's Petition, Respondents add the following:

Hawaii Revised Statutes, §128-3(d) Civil Defense Agency

> (d) The director shall, with the approval of the county council, appoint for each political subdivision a deputy director who may be removed by the director. Deputy directors shall serve without compensation from the State but shall receive such compensation as may be provided by the political subdivision pursuant to chapter 77. Chapter 76 shall apply to full-time deputy directors. Part-time deputy directors may hold other office or employment in the state government, or any political subdivision. Each deputy director, subject to the direction and control of the director, shall be the head of all local organizations for civil defense within the political subdivision for which the deputy director is appointed.

Revised Charter of the City and County of Honolulu

> Section 6-104. Civil Defense Agency — There shall be a civil defense agency headed by a civil defense administrator who shall be appointed and may be removed by the mayor in accordance with law. The civil defense administrator shall:
>
> (a) Develop, prepare and, under disaster or emergency situations, assist in the implementation of civil defense plans and programs to protect and promote the public health, safety and welfare of the people of the city.

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[2] No changes or additions have been made to the Questions Presented, Opinion Below, or Jurisdiction sections contained in Petitioner's Brief.

(b) Coordinate the civil defense activities and functions of the city with those of the State and federal governments and other public or private organizations for civil defense within the State.

Section 13-103(a). Boards and Commissions
Except as otherwise provided by this charter or by law, all boards and commissions established by this charter or by ordinance shall be governed by the following provisions:
(a) All members shall be appointed by the mayor and confirmed by the council.

Section 13-103(h). Boards and Commissions
(h) The affirmative vote of a majority of the entire membership shall be necessary to take any action, and such action shall be made at a meeting open to the public.

Section 6-310.1. Civil Service Commission Membership. The civil service commission shall consist of five members who shall believe in the principles of the merit system in public employment.

Revised Rules of the Civil Service Commission, Rule 1.1-A.1.6.e

e. Quorum and Number of Votes Necessary to Validate Acts. A majority of all members to which the Commission is entitled shall constitute a quorum to transact business, and the concurrence of a majority of all members to which the Commission is entitled shall be necessary to make valid any action of the Commission.

II. STATEMENT OF THE CASE

This action involves an employment dispute between the employer, City and County of Honolulu ("City") and its employee, Petitioner, Malcolm A. Sussel, who is still employed by the City at no reduction in his salary. The fundamental issues in this case require the interpretation and application of the City's

Revised Rules of the Civil Service Commission. Those issues are whether Petitioner was demoted or whether his position was downwardly reallocated as provided under the applicable civil service rules. Those issues have been remanded in this matter from the U.S. District Court to the State Court. In turn, the State Court stayed its proceedings to allow the Civil Service Commission ("Commission") to decide the issues. The Commission has rendered its decision, *See*, City and County's Brief, Appendix C, Commission's Final Decision and Order, ("City's Appendix C"), and Petitioner's appeal of that administrative decision is now pending before the State Circuit Court.

A. Relevant Facts

1. Petitioner's Reallocation

Petitioner served as the "head" of the City's Oahu Civil Defense Agency ("OCDA") from 1982 to the end of 1984 under the administration of Mayor Eileen Anderson. The head of civil defense is charged with the administration of island-wide civil defense programs and must therefore work in close harmony with the City Administration and State Civil Defense Administrator and staff. During Petitioner's term as head of civil defense, strained relationships developed between the State and City civil defense agencies.[3]

Following the election of Respondent Frank F. Fasi in 1984 as Mayor of the City ("Mayor Fasi"), Mayor Fasi appointed a bi-partisan citizen advisory committee, the Blue Ribbon Selection Committee, to interview candidates and recommend the most qualified to head up the various departments in his new administration, including civil defense. The Blue Ribbon Selection Committee recommended two people to Mayor Fasi for Civil Defense Administrator with Respondent George Kekuna, a former Lieutenant Colonel in the United States Air Force, who was at that time the Disaster Planner for the State Civil Defense Agency, as the Blue Ribbon Selection Committee's top choice. Accordingly, Mayor Fasi announced

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[3] The break in relationships between the State Civil Defense Administration and OCDA were admitted by Petitioner, himself, in his January 2, 1985 memorandum to Respondent Mayor Frank F. Fasi. Petitioner's Brief, Appendix C, page 37a-38a.

that he would name Mr. Kekuna to be the new head of the City's civil defense.

In response to Mayor Fasi's announcement that George Kekuna would be the new head of civil defense, Petitioner wrote a letter to the Mayor asking him to "reserve judgment on the status of [his] position and qualifications as Administrator of OCDA" and requested a personal meeting with the Mayor. On December 15, 1984, Mayor Fasi and Petitioner met, at which time Sussel asserted he was a civil service employee and, as such, could not be removed by the Mayor from his position as head of civil defense. Mayor Fasi disputed Sussel's contention, and upon assuming office in January of 1985, he appointed Mr.Kekuna as an Executive Assistant with the title of Deputy Director Designate to oversee and supervise the City Civil Defense.[4] Sussel was informed at this time that he would remain employed with civil defense and continue to receive the same pay but would be subject to the authority of Mr. Kekuna. Thereafter, Petitioner's job description was revised to reflect changes in his duties and responsibilities, and his position was reallocated or reclassified to conform to the City's civil service classification system. However, Petitioner continued to receive the same pay as required under civil service rules.

2. Petitioner's Civil Service And State Court Actions

Because he believed the City's actions constituted a demotion, Petitioner appealed the reallocation to the Civil Service Commission. He contended that the "demotion" was politically motivated and a violation of the Civil Service policies and rules. After a Civil Service evidentiary hearing in October of 1985, the Commission ruled that Petitioner's position, Civil Defense Administrator, was not a Civil Service position and that Petitioner, accordingly, was not protected by Civil Service procedures.

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[4] The Mayor was appointed Deputy Director of the County's Civil Defense by the State Director of Civil Defense in accordance with State law, Hawaii Revised Statutes, Chapter 128. Mr. Kekuna, as Deputy Director Designate, was delegated the Mayor's authority as Deputy Director of Civil Defense.

Petitioner appealed that administrative decision to the State Circuit Court. Over a year later in May of 1987, the Circuit Court reversed the Commission's decision and held that the Petitioner's position was subject to Civil Service protection. The Court remanded the case to the Commission for further proceedings to determine whether Petitioner had been afforded the procedures required under the civil service rules.

At no time in his appeal to the State Circuit Court did Petitioner raise any contention that Commission members were biased against him or that there were any circumstances which could give rise to an appearance of impropriety as to any Commission member.

On the remand from the State Circuit Court to the Commission, Petitioner, in December of 1987, filed for the first time motions to disqualify the Commissioners on the basis of personal bias and prejudice. *See, Sussel v. City and County of Honolulu, et al.*, Nos. 13430 and 13484, *slip. op.* at 4 (Haw. S.Ct. Dec. 19, 1989), Appendix 1. However, in seeking to disqualify the Commissioners, Petitioner was not objecting to the earlier October, 1985 Civil Service hearing, but rather, Petitioner was objecting to having any of the Commissioners hear the remanded Civil Service case because he had brought suit against all the Commissioners in Federal Court in December of 1986 in *Sussel v. City & County of Honolulu, et al.*, No. 86-1136 (D. Haw. *Dec. 15, 1986*).

When the disqualification motions were denied by the Commission, Petitioner filed a civil action in the Circuit Court, *Sussel v. City and County of Honolulu, et al.*, Civil No. 88-1285-04 (1st Cir. Ct., State of Haw. April 1988). There he reiterated the claims he had alleged in the 1986 federal action and he asserted a new claim against the Commissioners because of their refusal to remove themselves from hearing his Civil Service proceeding. That State Court suit was removed to the Federal District Court in June of 1988 (U.S. Dist. Ct. Civil No. 88-00375) and consolidated with the earlier civil action.

In August of 1988, Mr. Sussel brought yet another action in the State Circuit Court to enjoin all the Commissioners from further participating in the remanded Civil Service proceedings. *Sussel v. City & County of Honolulu Civil Service Commission, et al.*, Civil No.88-2509-08 (1st Cir. Ct. Haw. 1988).

The State Court enjoined only one Commissioner from participating in any further hearings and ruled that Petitioner's hearing before the Commission could proceed as long as a quorum was established as required by State law.

On October 31, 1988, Petitioner appealed that Circuit Court decision to the Hawaii Supreme Court and obtained a stay from the Hawaii Supreme Court of all Commission activities on Petitioner's case pending a final determination by the Hawaii Supreme Court.

More than a year later on December 19, 1989, the Hawaii Supreme Court entered its decision on Petitioner's appeal, which resulted in the disqualification of two of the five Commission members on the basis of "an appearance of impropriety" standard. Appendix 1.

3. Federal Court And Remanded Proceedings

In March of 1989, the District Court ruled on the parties' various motions to dismiss or for summary judgment in the consolidated cases, DC No. 86-1136 (federal) and DC No. 88-00375 (removed). Petitioner's Brief, Appendix C. As a result, dismissal or summary judgment was granted to Respondents as to all of the Petitioner's federal causes of action, including Petitioner's 42 U.S.C. §1983, Fourteenth and 1st Amendment claims. Additionally, summary judgment was granted to Respondents on various state common law claims, including Petitioner's causes of action for defamation.

The District Court dismissed without prejudice all remaining state law causes of actions in DC No. 86-1136 and remanded to the State Circuit Court all identical, remaining state law causes of actions in DC No. 88-00375.

On appeal to the 9th Circuit, the 9th Circuit affirmed the District Court with regard to the District Court's grant of summary judgment in favor of Respondents on all of Petitioner's federal causes of action. Petitioner's Brief, Appendices A & B.

Subsequent to the filing of the appeal to the 9th Circuit, the remanded State Court proceedings were stayed pending the final outcome of the Civil Service proceedings. The issues before the Commission were whether Petitioner was demoted or downwardly reallocated, and whether Petitioner was subjected to political discrimination. From December,

1990 through January, 1991, an eleven day Civil Service evidentiary hearing was held to decide these issues. The five member Commission unanimously ruled that Petitioner had not been demoted, but rather had been properly downwardly reallocated as provided under the City's Civil Service rules and that no political discrimination had been involved in the actions taken. City's Appendix C. Petitioner's appeal of the Commission's Final Decision and Order is now pending before the State Circuit Court, and the parties are entitled to appeal that Circuit Court decision to the Hawaii Supreme Court.

III. REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

A. The Controversy Is Based Upon County Or State Law Issues And Presents No Federal Questions Of Substance.

A writ of certiorari should not be granted where the controversy primarily implicates questions of County or State law and presents no federal questions of substance. *Wolf v. Weinstein*, 372 U.S. 633, *reh. den.* 373 U.S. 928 (1963). This is such a case.

In essence, the courts below determined that Petitioner had no viable federal cause of action, and that to the extent Petitioner was entitled to redress, such redress would or should be through the state system.[5] And, rightly so, as all of Petitioner's claims are premised on state law issues which are, at the present time, being addressed by the Civil Service Commission and the State Courts.

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[5] That determination could properly be based upon abstention under *Pullman v. Railroad Commission*, 312 U.S. 496 (1941), where a difficult and unsettled question of state law must be resolved before a federal question can be decided, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984); or upon a determination under *Parratt v. Taylor*, 451 U.S. 527 (1981), overruled on other grounds, *Daniels v. Williams*, 474 U.S. 327 (1986), that there is no cause of action for a denial of due process as adequate state procedures are still available.

As set forth above, when all is said and done, this case involves an employment dispute between the City and one of its employees and whether the employee was afforded the procedures provided under the City's Civil Service laws.

After the District Court remanded the state law claims to the State Court, the State Court proceedings were stayed to allow the Commission to rule on the civil service issues. Thereafter, the five member Commission unanimously ruled that Petitioner had not been demoted, but rather had been properly downwardly reallocated[6] in accordance with the City's civil service rules and that no political discrimination had been involved in the actions taken. City's Appendix C. Petitioner's appeal of that decision is now pending in the State Circuit Court and the parties are entitled to appeal the Circuit Court's decision to the Hawaii Supreme Court.

Thus, certiorari should not be granted as the fundamental issues that underlie this entire case are County or State law issues, the determination of which will require the interpretation and application of the City's civil service rules and regulations and State law, and those issues are presently being decided in the State forums.

B. There Is No Conflict Regarding The Application Of *Mt. Healthy's* "But For" Test And, In Any Event, There Was No Political Discrimination.

Petitioner attempts to create an issue for the grant of certiorari by contending that the 9th Circuit has failed to apply the "Mt. Healthy substantial or motivating factor causation test"

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[6] *Bell v. Department of Health and Human Services*, 483 So.2d 945, 948-951 (La. 1986). (Demotions and reallocations are mutually exclusive actions. A demotion is a disciplinary action based upon an evaluation of the job performance of an employee whereas a reallocation is a reclassification of a position within the civil service classification system based upon a change in the duties assigned to the position. Pre-deprivation procedures are required for demotions but not for reallocations.)

as to the claim of political discrimination, and that the 9th Circuit's actions have created a conflict among the circuits.[7] However, not only has Petitioner misconstrued the 9th Circuit's ruling but Petitioner has misinterpreted this Court's decision in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977).

Mt. Healthy made it clear that even if constitutionally protected conduct played a part or even a substantial part in an adverse employment decision that fact was not enough to establish that a constitutional violation had occurred. *Id.* 429 U.S. at 285. A plaintiff still must prove that the adverse employment decision occurred "because of" the constitutionally protected conduct. *Id.* 429 U.S. at 286. In other words, it is a "but for" standard of causation, *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 417 (1979), i.e. the adverse employment decision would not have occurred *but for* the fact that the employee engaged in the protected conduct.

The "substantial or motivating factor causation test" that has been raised by Petitioner is simply a burden shifting test that is used in mixed-motive cases to reach the causation issue. The plaintiff has the initial burden of showing that the protected conduct was a "substantial or motivating factor" for the adverse decision. Then the burden shifts to the employer to show that the same decision would have been made even in the absence of the protected conduct. *Mt. Healthy*, 429 U.S. at 287.

However, notwithstanding this burden shifting test, the ultimate question remains whether the adverse employment decision occurred *because of* the protected conduct. Thus, the 9th Circuit's conclusion that Petitioner had not presented sufficient probative evidence that he was removed *because of* his political affiliation is entirely consistent with the *Mt. Healthy* decision.

The court's decision was also consistent with the facts. At best, Petitioner showed that the Mayor and Mr. Kekuna held responsible positions in the same political party and that Mr. Kekuna supported the Mayor's nomination. However, the

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[7] Nor is there even a conflict among the cases cited by Petitioner as all of the cases either adopt or apply the *Mt. Healthy* burden shifting test.

facts established that it was the bi-partisan Blue Ribbon Selection Committee that interviewed the applicants for positions within the incoming Administration and it was the Blue Ribbon Selection Committee that ultimately recommended George Kekuna to Mayor Fasi as the Committee's top choice for the post of civil defense administrator.

Moreover, Petitioner's insistence on contending that a political "commitment" was made by Mayor Fasi to Mr. Kekuna is a distortion of the record.[8] A "commitment" was indeed given to Mr. Kekuna as was the case with other appointees. The "commitment" was that if Mr. Kekuna accepted the Mayor's promise of an appointment and quit his existing civil service job with the State, that Mr. Kekuna would, in fact, be appointed to the City's civil defense position. No more, no less. Outside of Petitioner's repeated conclusory allegations of a political "commitment" having been made by Mayor Fasi to Mr. Kekuna, no evidence was ever submitted by Petitioner that a political commitment had been made by Mayor Fasi to Mr. Kekuna. Thus, the 9th Circuit properly concluded that there was insufficient evidence to support Petitioner's political discrimination claim.

Further, even assuming *arguendo* that Petitioner's reallocation was motivated by political considerations, Petitioner's political affiliation would have been a proper consideration for First Amendment purposes.

The First Amendment protects public employees from discharge because of their political affiliation. *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990); *Elrod v. Burns*, 427 U.S. 347 (1976). However, that protection does not apply

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[8] Unfortunately, Petitioner's Brief is replete with these type of unsubstantiated, conclusory statements, most without references to the record.

See, Petitioner's Brief, p. 8 where Petitioner claims that Respondent Anderson "informed a media representative in early 1985 that 'we intend to win in the Civil Service Commission; we'll drag it out until Sussel and HGEA can't afford to continue and will quit.'" Despite ample opportunity to take depositions or submit affidavits on this point, Sussel never produced any evidence to substantiate that this alleged statement was ever even made.

when "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518 (1980). Among the factors considered is whether the office involves the formulation of policy, or access to confidential information, or requires the occupant to communicate the views of elected officials to the public or other members of government. *Elrod*, 406 U.S. at 375 (Stewart, J., concurring in the judgment); *Branti*, 445 U.S. at 518.

Courts have developed a two stage *Elrod-Branti* inquiry. The first inquiry is whether "the position involve[s] government decision making on issues where there is room for political disagreement on goals or their implementation." *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241-32 (1st Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987); *see Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985). The second is "to examine the particular responsibilities of the position to determine whether it resembles a policymaker, a privy to confidential information, a communicator or some other office holder whose function is such that party affiliation is an equally appropriate requirement." *Jiminez Fuentes*, 807 F.2d at 242; *Tomczak*, 765 F.2d at 641 (court should determine whether officeholder "has meaningful direct or indirect input into the decision making process").

Here, the position of head of civil defense clearly satisfies the first inquiry. While the general goal of civil readiness for emergencies may be widely shared, the role which government should play is properly the subject of partisan disagreement. *See Jiminez Fuentes*, 807 F.2d at 243; *Tomczak*, 765 F.2d at 641 ("there could be principled disagreements" about the operation of city water department).

The position is also one for which political affiliation is a legitimate attribute because the head of civil defense creates the City's civil defense policy and communicates that policy to the public. Section 6-104 of the City Charter provides that the head of civil defense shall "develop [and] prepare civil defense plans and programs...." Further, the Position Description prepared in 1981 states that the official is responsible for the development of "Civil Defense Plans" and for "extensive

planning and coordination involving participation of community groups, private industries, and intergovernmental agencies in affected programs." CR: 518, Ex B; *cf. Jiminez Fuentes*, 807 F.2d at 244.

Moreover, the administrative duties of the civil defense position are extensive and involved significant discretionary authority. CR: 518, Ex.B; *cf. Jiminez Fuentes*, 807 F.2d at 244; *Tomczak*, 765 F.2d at 642. Further, as found by the District Court, Petitioner, in his role as head of civil defense, was the agency's media representative. Petitioner's Brief Appendix C, page 34a; CR: 518, Ex.B; *cf. Jiminez Fuentes*, 807 F.2d at 244.

In *Cordero v. De Jesus-Mendez*, 867 F.2d 1 (1st Cir. 1989), the court found that political affiliation was an appropriate qualification for the position of municipal civil defense director. The court emphasized the policy-making role inherent in preparing civil defense plans, as well as the fact that the director was appointed and removable by the Mayor and was required to work directly with the Mayor. *Id.* at 12-13; *cf.* City Charter Section 6-104 (head of OCDA "shall be appointed and may be removed" by Mayor); CR: 518, Ex. B (head of OCDA shall "[p]erform other duties directed by Mayor/Managing Director").

In sum, Petitioner in his role as the head of civil defense was a policymaking/confidential official who was required to communicate the Administration's position regarding civil defense. Thus, political affiliation would have been a legitimate requirement of such a position, and Petitioner's First Amendment rights were not violated even if his reallocation had been politically motivated. *Jiminez Fuentes*, 807 F.2d at 244.

For all these reasons, certiorari should not be granted on this issue.

C. Petitioner Did Not Preserve Any Issue Regarding Denial Of Due Process In The 1985 Civil Service Hearing And, In Any Event, He Would Not Have Prevailed In The 1985 Hearing.

Petitioner again attempts to manufacture an issue for the grant of certiorari by contending that he was deprived of due process because two Civil Service Commissioners who

participated in the 1985 Civil Service hearing were biased against him.

First, this issue has never been preserved for review. The alleged bias or lack of impartiality of the two Commissioners, Hiroo Miyagi and Ernest Dias, would have occurred during the course of the first Civil Service Commission hearing in October of 1985. However, Petitioner never raised the bias or denial of due process issue in his post hearing brief to the Commission, nor were those issues raised in his appeal to the Circuit Court from the Commission's decision.

In fact, Petitioner first attempted to disqualify the two Commissioners in December, 1987, in an effort to prevent all the Commissioners from further participating in his civil service proceedings after the case had been remanded to the Commission from the Circuit Court. Even then, Petitioner was not contending that he was denied due process or somehow prejudiced in the 1985 Civil Service hearing, but rather, Petitioner was objecting to any of the Commissioners hearing the remanded civil service case because he had now brought suit against all the Commissioners in federal court, *Sussel v. City and County of Honolulu, et al.* No. 86-1136 (D. Haw. Dec.15, 1986).

When the Commissioners refused to disqualify themselves, Petitioner filed a State Court action to enjoin all the Commissioners from further participating in the remanded civil service proceedings.

Thus clearly the issue of bias of the two Commissioners or denial of due process from the 1985 civil service hearing was not preserved for review and should provide no basis for the grant of certiorari.

On the other hand, the Hawaii Supreme Court's disqualification of Mr. Miyagi and Mr. Dias from participating in any further civil service proceedings of Petitioner, ensured that Petitioner's due process rights would not be violated because of a biased or less than impartial Commission. Thus Petitioner's claims of denial of due process are without merit.

Finally, Petitioner's arguments that he would have won in the 1985 Civil Service hearing if the two biased Commissioners had not participated is without any merit. As with the previously discussed issue, this issue was never preserved

for review. Moreover, Petitioner's arguments are simply incorrect. Under the Rules of the Civil Service Commission a majority of the entire membership of the Commission must agree before an action can be deemed invalid.

> e. Quorum and Number of Votes Necessary to Validate Acts. A majority of all members to which the Commission is entitled shall constitute a quorum to transact business, and the *concurrence of a majority of all members to which the Commission is entitled shall be necessary to make valid any action of the Commission.*

Revised Rules of the Civil Service Commission, Rule 1.1-A.1.6.e.; also, City Charter, Section 13-103(h). The Commission is entitled to have five members.[9] City Charter, Section 6-310.1. Thus, all three remaining Commissioners would have had to agree on the decision for it to be valid. A 2-1 vote would have been invalid.

For all these reasons, there is no basis for granting certiorari on this issue.

D. Petitioner's Claims Regarding The Alleged Unreasonableness Of Delay In The Civil Service Process Merely Involves A Review Of Findings Of Fact Which Would Be Of No Importance Except To the Litigants Themselves.

This Court has repeatedly denied petitions for writ of certiorari where the issues presented merely involve review of findings of fact which would be of no importance except to the litigants themselves. *Rudolph v. U.S.*, 370 U.S. 269, 270, *reh. den.* 371 U.S. 854 (1962); *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 177 N.8 (1981); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). Such is the nature of Petitioner's contentions regarding the allegedly unreasonable delays in the Civil Service proceedings.

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[9] By Charter, the members of the Commission are appointed by the Mayor subject to confirmation by the City Council. City Charter, Section 13-103.(a).

Here, the District Court reviewed all of the allegations and facts involving the delay between the initial filing of Petitioner's Civil Service Appeal and the rendering of the Commission's decision.

> As noted above, the final commission decision was entered eleven months after plaintiff filed his appeal of his demotion. Although plaintiff argues that this delay amounts to a denial of a timely hearing, this court cannot find as a matter of law that it is one of constitutional proportions. *Loudermill*, 470 U.S. at 547. This court takes judicial notice of the fact that it is not uncommon for actions brought before Boards, Commissions and state and federal courts to take many months or even years before a hearing is held and a decision rendered. Were this delay to be a basis for an action under 42 U.S. C. §1983, the federal courts would be inundated with such actions because delay of some duration is the unfortunate rule in these proceedings rather than the exception.

Petitioner's Appendix C, page 43a.[10]

Moreover, with respect to the delay that occurred after the rendering of the Commission's decision, the District Court again found no constitutional violations and, in fact, the Court found that Petitioner was at least partially responsible for the delays.

> Further, as the procedural history indicates, plaintiff is responsible for at least a share of the

[10]Again, Petitioner erroneously states that the District Court and Court of Appeals failed to address the issue of the delay between the filing of his civil service appeal and the rendering of a decision by the Commission. However, as the above quoted language shows, the District Court specifically addressed the initial delay and found no constitutional violation. That finding was affirmed by the 9th Circuit. Appendix A to Petitioner's Brief, page 9a.

> delay which has occurred since the Commission's decision was initially rendered. This court notes that the petitioning of the Commission and filing of appeals by both parties are valid stratagem and are recognized rights guaranteed by the term "due process". Therefore, this court finds that the delay since January 7, 1986, the date of the original Commission decision, is the result of the appeals process inherent in administrative proceedings and is not fundamentally deficient.

Id.

Thus clearly the issue of the allegedly unreasonable delay provides no basis for the grant of certiorari.

E. There Is No Basis For A Grant Of Certiorari On The Issue Of Deprivation Of A Liberty Interest As Petitioner Specifically Elected Not To Appeal the Judgment Against Him On His Defamation Claim, And, In Any Event, Petitioner Was Neither Stigmatized Nor Deprived Of A Liberty Interest By Respondents' Statements And Actions.

In attempting to establish a cause of action for deprivation of a liberty interest because of statements made by government officials an employee must prove both that (1) the statements were so defamatory that they stigmatized him by calling into question his morality, honesty or loyalty, *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) *and* that (1) he suffered a tangible loss of employment or employment prospects as a result. *Siegert v. Gilley*, 59 U.S.L.W. 4465, 4467, and 4469 (Marshall, J. dissenting) (May 23, 1991). Thus, establishing that the statements were defamatory is a necessary first step in maintaining a cause of action for deprivation of a liberty interest.

Here, Petitioner cannot even satisfy the first step of showing that he was defamed. The District Court ruled that the allegedly defamatory statements Petitioner complains of were not defamatory and the Court granted summary judgment to the Respondents on the issue of defamation. The District Court's ruling was never appealed. In fact, Petitioner

specifically elected not to appeal that issue. Appendix 2. Therefore, Petitioner has no basis for raising the liberty interest claim in this Petition for Writ of Certiorari.

Even assuming, *arguendo*, that the non-defamatory statements could still somehow stigmatize Petitioner, the statements complained of do not begin to approach the sort of statements which this and other courts have found to be stigmatizing. Examples of stigmatizing statements include ones alleging "dishonesty or immorality." *Board of Regents v. Roth*, 408 U.S. at 573. Other decisions which have found stigmatization concerned allegations of subversive activities, *United States v. Lovett*, 328 U.S. 303 (1946); disloyalty, *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Peters v. Hobby*, 349 U.S. 331 (1955); and alcoholism, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

The statements which Petitioner asserts stigmatized him essentially state that he did not perform his job well and that he did not work well with others. Petition at 24-25. In light of the decisions of this Court, these statements are far from stigmatizing. In addition, numerous courts have found that statements nearly identical to those at issue here were not stigmatizing. *E.g.*, *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1101 (9th Cir. 1981), *cert. denied* 455 U.S. 948 (1982); *Paige v. Harris*, 584 F.2d 178, 184 (7th Cir. 1978); *Lake Michigan College Federation of Teachers v. Lake Michigan Community College*, 518 F.2d 1091, 1097 *cert. denied*, 427 U.S. 904 (1976); *Abeyta v. Town of Taso*, 499 F.2d 323 (10th Cir. 1974); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied* 411 U.S. 972 (1973).

Finally, this Court has reaffirmed the fact that injury to reputation alone is not enough to establish a cause of action for deprivation of a liberty interest. *Siegert v. Gilley*, 59 U.S.L.W. at 4467, and 4469 (Marshall, J., dissenting). At the very least, the Plaintiff must show that the reputational injury has caused an employment loss. *Id.* Here, Petitioner does not now contend, nor has he ever contended, that any alleged defamatory statements resulted in any employment loss. Clearly, Petitioner is merely contending that defamation by a government official is a constitutional deprivation. However, as set forth in *Siegert*, "defamation by itself, is a tort actionable

under the laws of most states, but not a constitutional deprivation." *Id.* 59 U.S.L.W. at 4467.

Accordingly, for all these reasons, Petitioner has failed to establish any reason why this Court should grant the Petition for Writ of Certiorari on this issue.

F. Petitioner Has No Substantive Due Process Claims.

The courts below properly determined that Petitioner had not alleged a valid substantive due process claim. As stated by the 9th Circuit, Petitioner's allegations that he was improperly demoted do not amount to "egregious treatment" that reaches the level of a substantive due process violation. Appendix A to Petitioner's Brief, page 9a. citing *U.S. v. Salerno*, 481 U.S. 739, 746 (1987).

Moreover, as stated by the District Court, Petitioner is really contending that he was not afforded all of the procedures he was entitled to under the civil service rules. Thus, at most, Petitioner is attempting to raise a procedural due process violation, not a substantive due process claim.

Further, as previously discussed, the underlying issue in this case is whether Petitioner was demoted or merely downwardly reallocated. The Civil Service Commission has ruled that Petitioner was properly reallocated and that political discrimination was not involved. Therefore, at this point in time, there is no basis to even contend that a procedural due process violation has occurred.

Accordingly, Petitioner's substantive due process contentions should provide no basis for the granting of certiorari in this case.

IV. CONCLUSION

Certiorari should be denied as the courts below were correct in dismissing Petitioner's federal causes of action as Petitioner did not have a basis for those claims either legally or factually.

Moreover, as demonstrated in the discussions above, certiorari should be denied as the civil service issues that underlie this entire case are presently being contested in the State courts and civil service proceedings. In fact, the very

issue upon which virtually all of Petitioners contentions are premised, i.e., that he was demoted contrary to civil service rules and procedures, has now been decided against Petitioner after a lengthy civil service trial/hearing. Thus, at the present time, Petitioner cannot even show that his civil service rights were violated, let alone demonstrate that his constitutional rights were violated.

A grant of certiorari will not aid in the resolution of a matter that has gone on now for over six years. To the extent Petitioner is entitled to redress, his relief is through the available civil service and State court proceedings. Therefore, for all of the reasons set forth above, Respondents respectfully request that Petitioner's Petition for Writ of Certiorari be denied.

DATED: Honolulu, Hawaii September 10, 1991.

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APPENDICES

APPENDIX 1

HAWAII SUPREME COURT
FILED December 19, 1989
8:16 a.m.
LOIS E. AIMOTO, Clerk Hawaii
Supreme Court

IN THE SUPREME COURT OF THE STATE OF HAWAII

MALCOLM A. SUSSEL, Plaintiff-Appellant, Cross-Appellee, v. CITY AND COUNTY OF HONOLULU CIVIL SERVICE COMMISSION; HIROO "WOODY" MIYAGI, individually, and in his capacity as Chairman of the aforesaid Commission; ERNEST DIAS, individually, and in his capacity as a member of the aforesaid Commission; BEVERLY NAGY, individually, and in her capacity as a member of the aforesaid Commission; ISABEL TAGALA, individually, and in her capacity as a member of the aforesaid Commission; and NEIL SILVA, individually, and in his capacity as a member of the aforesaid Commission, Defendants-Appellees, Cross-Appellants

NOS. 13430 & 13484

APPEAL FROM THE FIRST CIRCUIT COURT

HONORABLE MARIE N. MILKS, JUDGE
HONORABLE SIMEON ACOBA, JR., JUDGE
HONORABLE ROBERT KLEIN, JUDGE

(CIV. NO. 88-2509-08)

December 19, 1989

LUM, C.J., NAKAMURA, PADGETT, HAYASHI, AND WAKATSUKI, JJ.

ADMINISTRATIVE LAW — in general — constitutional and statutory provisions in general — agencies and proceedings affected.

SAME — powers and proceedings of administrative agencies, officers and agents — hearings and adjudications — nature and form of proceedings.

SAME — same — bias, prejudice or other disqualification to exercise powers.

CONSTITUTIONAL LAW — due process of law — constitutional guarantees in general — procedural due process in general.

SAME — same — administrative proceedings — in general.

The basic requirement of due process that there be a fair trial in a fair tribunal applies to administrative agencies which adjudicate as well as to courts.

ADMINISTRATIVE LAW — in general — constitutional and statutory provisions in general — agencies and proceedings affected.

SAME — same — bias, prejudice or other disqualification to exercise powers.

CONSTITUTIONAL LAW — due process of law — constitutional guarantees in general — procedural due process in general.

SAME — same — administrative proceedings — in general.

A biased decision-maker is constitutionally unacceptable. But no one would argue seriously that the disqualification of decision-makers on grounds of actual bias prevents unfairness in all cases. So our system of justice has always endeavored to prevent even the probability of unfairness.

ADMINISTRATIVE LAW — in general — constitutional and statutory provisions in general — agencies and proceedings affected.

SAME — same — bias, prejudice or other disqualification to exercise powers.

SAME — same — administrative proceedings — in general.

Justice can perform its high function in the best way only if it satisfies the appearance of justice. For in a popular government, justice must not only be done but must manifestly be seen to be done. And there can be little question that use of a truly independent adjudicator is essential to this goal.

ADMINISTRATIVE LAW — in general — bias, prejudice or other disqualification to exercise powers.

SAME — powers and proceedings of administrative agencies, officers and agents — hearings and adjudications — nature and form of proceedings.

JUDGES — disqualification to act — bias and prejudice — in general.

A judge should avoid impropriety and the appearance of impropriety in all his activities, and he should disqualify himself in a proceeding in which his impartiality might reasonably be questioned.

ADMINISTRATIVE LAW — in general — constitutional and statutory provisions in general — agencies and proceedings affected.

SAME — powers and proceedings of administrative agencies, officers and agents — hearings and adjudications — nature and form of proceedings.

SAME — same — bias, prejudice or other disqualification to exercise powers.

CONSTITUTIONAL LAW — due process of law — constitutional guarantees in general — procedural due process in general.

Since the fundamentals of just procedure impose a requirement of impartiality on administrative agencies which adjudicate as well as on courts, there is no reason why an administrative adjudicator should be allowed to sit with impunity in a case where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on his impartiality.

OPINION OF THE COURT BY NAKAMURA, J.

The question in this interlocutory appeal and cross-appeal from the Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part Plaintiff's Motion for Preliminary Injunction entered by the Circuit Court of the First Circuit is whether "actual bias" or "an appearance of impropriety" should be the test for disqualifying a member of the civil service commission whose impartiality has been challenged by the public employee who brought an appeal from an adverse action by his employing authority. Because an impartial tribunal is an essential component of due process in a quasi-judicial proceeding and "justice must satisfy the appearance of Justice [,]" *Offutt v. United States*, 348 U.S. 11, 14 (1954), we conclude "an appearance of impropriety" is the proper standard and any commissioner whose impartiality might reasonably be questioned should be disqualified from hearing the appeal.

I.

Malcolm A. Sussel was appointed Administrator of the Oahu Civil Defense Agency (OCDA) on June 2, 1982 by Mayor Eileen Anderson after he applied for the position, took a written examination administered by the Department of Civil Service of the City and County of Honolulu, and was interviewed by a selection board. The position, he understood, was a civil service position, i.e., one subject to protection under the "system of personnel administration based on merit principles and generally accepted methods governing the classification of positions and the employment, conduct, movement and separation of public officers and employees[]" prescribed by the City's charter. Revised Charter of the City & County of Honolulu (Rev. Charter), chapter 3, section 6-302. He therefore assumed the system provided "[r]easonable job security for the competent employee[]" who occupied the position and he could not be moved arbitrarily therefrom. *Id.*

But shortly after Frank A. Fasi was elected mayor again after a hiatus of four years, Sussel learned the mayor-elect intended to name George Kekuna Administrator of the

OCDA. Sussel wrote Mr. Fasi advising him that the post was not exempted from civil service and asking the mayor-elect to reconsider his decision. Mr. Fasi, however, was not dissuaded by Sussel's plea; upon assuming office in January of 1985, he appointed Mr. Kekuna as the Administrative Assistant to the City's Managing Director. The Managing Director assigned Mr. Kekuna the powers and duties that had been exercised by the Administrator of the OCDA, and Mr. Sussel was relegated to tasks entailing lesser responsibilities.

Deeming the action a demotion, Mr. Sussel appealed to the Honolulu Civil Service Commission. He averred the demotion was a politically motivated act of the mayor breaching civil service policies and rules. Though the appeal was filed in January of 1985, the commission failed to conduct a hearing thereon for nine months. In the meantime, the composition of the commission had changed. By the time the hearing was convened, two of the four commissioners who were appointed by Mayor Anderson had been replaced by appointees of Mayor Fasi.

The hearing commenced with deputies of the Corporation Counsel advising the commission and representing the employing authority. Mr. Sussel moved unsuccessfully to disqualify the deputy assigned to provide legal advice to the commission, citing Hawaii Revised Statutes (HRS) § 76-47 to support his position.[1/] After hearing the evidence presented by the employee and the employing authority, the commission ruled the position to which Mr. Sussel had been appointed was not a civil service position.

1/ HRS § 76-47 provides in part that:

> When an appeal hearing is before a county civil service commission, the attorney general shall be counsel for the commission and the county attorney or corporation counsel shall be counsel for the appointing authority. If, however, an appeal hearing is before the state commission, the attorney general shall be counsel for the appointing authority and the county attorney or corporation counsel of the county in which the appeal hearing is being conducted shall be counsel for the commission.

The Corporation Counsel takes the position that the provision does not apply to the City and County of Honolulu. We do not reach the question of whether the City's position is correct or not in this appeal.

Mr. Sussel sought judicial review of the administrative decision in the Circuit Court of the First Circuit.[2/] The circuit court reversed the commission, holding the position to which Malcolm Sussel had been appointed was subject to civil service protection. The court remanded the case to the civil service commission for a determination of the merits of Mr. Sussel's appeal.

Upon remand of the case, Mr. Sussel moved to disqualify all members of the commission from hearing his appeal. They were he averred, prejudicially biased because of the civil action then pending in the federal district court. *See supra* note 2. When the disqualification motion was denied, he filed a civil action in the circuit court, reiterating the claims alleged in the federal action and asserting a new claim premised on the commissioners' refusal to remove themselves from his appeal. The state court suit was removed to the federal district court in June of 1988 and consolidated with the earlier civil action. The federal court, however, decided to abstain from ruling on Mr. Sussel's claims against the commissioners and the other defendants in the suits.

In August of 1988, Mr. Sussel brought yet another action in the circuit court. He prayed, among other things, for preliminary relief enjoining the commissioners from hearing his appeal. He called the circuit court's attention to this court's decision in *Honolulu Roofing Co. v. Felix*, 49 Haw. 578, 426 P.2d 298 (1967), where we directed a circuit judge to recuse himself because the circumstances were such as to raise doubts about his fairness, and urged the circuit court to apply "an appearance of impropriety" test in the situation at hand and disqualify the commissioners.

The circuit judge concluded a preliminary injunction should be issued. Applying an "actual bias" test, she concluded one of the five commissioners should be disqualified. She further

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2/ Before the circuit court ruled, however, Mr. Sussel filed a complaint in the United States District Court for the District of Hawaii, alleging that the members of the commission and others had deprived him of his constitutional rights, including the right to a fair hearing.

concluded the commissioner's chairman could not be disqualified under the foregoing standard, but she found his sitting in judgment of Mr. Sussel's claim of a wrongful politically motivated demotion would give "an appearance of impropriety." Though she did not enjoin the chairman's participation in the appeal, she recommended tha he recuse himself. She neither enjoined the participation of the other commissioners in the appeal nor suggested that they recuse themselves.

The circuit judge also granted Mr. Sussel leave to seek interlocutory review of her ruling that a civil service commissioner is disqualified from hearing a public employee's appeal from an adverse action of the employing authority only upon a demonstration of "actual bias."

II.

Mr. Sussel seeks a ruling on appeal that the circuit court erred in applying an "actual bias" test in judging a civil service commissioner's qualification to sit in judgment of a public employee's appeal to the commission from a demotion. The commission and the commissioners, who have cross-appealed, urge a reversal of the disqualification of Commissioner Ernest Dias. Thus, the dispositive issue before us is what standard applies in deciding whether a civil service commissioner is disqualified or not.

A.

The civil service commission is the body within the City government empowered to hear employee appeals. Rev. Charter, section 6-310. "Any person aggrieved by any action of the director of civil service or who has been suspended, demoted or dismissed may appeal to the . . . commission for redress, pursuant to its rules and regulations." Rev. Charter, section 6-308. The commission, therefore, is the administrative agency authorized by law to adjudicate Mr. Sussel's claim that he has been deprived of certain rights ad privileges bestowed by the "system of personnel administration based on merit principles" which has been adopted by the City. Rev. Charter, section 6-302.

"[T]here are certain fundamentals of just procedure which are the same for every type of tribunal and every type of proceeding." R. Pound. *Administrative Law* 75 (1942). "Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U.S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to courts. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973)" *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). Of course, "a biased decisionmaker [is] constitutionally unacceptable[.]" *Id.* at 47. But "no one would argue seriously that the disqualification of [decisionmakers] on grounds of actual bias . . . prevents unfairness in all cases." *State v. Brown*, 70 Haw. 459, 467, 776 P.2d 1182, 1187 (1989). So "our system of [justice] has always endeavored to prevent even the probability of unfairness." *In re Murchison*, *supra*.

The Supreme Court teaches us too that justice can "perform its high function in the best way [only if it satisfied] 'the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14. *In re Murchison, supra*. For in a popular government, 'justice must not only be done but must manifestly be seen to be done . . . .' *Rex v. Justices of Bodmin*, [1947] 1 K.B. 321, 325." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 n.19 (Frankfurter, J., concurring) (1951)). And,

> "[t]here can be little question that use of a truly independent adjudicator is essential to attainment of this goal. Indeed, if there exists any reasonable doubt about the adjudicator's impartiality at the outset of a case, provision of the most elaborate procedural safeguards will not avail to create [an] appearance of justice."

M.Redish & L. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L. J. 455, 483-84 (1986). Our Code of Judicial Conduct and a recent opinion of this court reflect these teachings.

An issue in *State v. Brown* was "whether a judge who causes a criminal contempt proceeding to be instituted may then sit with impunity in judgment of the accused." 70 Haw. at 465, 776 P.2d at 1187. We ruled the judge could not do so, relying

in part on *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), where the Court said:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."

Our ruling, we noted, was "consistent with our general admonition [to judges] that 'A Judge Should Avoid Impropriety and the Appearance of Impropriety in all his Activities,' Code of Judicial Conduct, Canon 2, and our expectation that [a judge would] 'disqualify himself in a proceeding in which his impartiality might reasonably be questioned[.]' Code of Judicial Conduct, Canon 3 C.(1)." *State v. Brown*, 70 Haw. at 467 n.3, 776 P.2d at 1188 n.3.

Since the fundamentals of just procedure impose a requirement of impartiality on "administrative agencies which adjudicate as well as [on] courts[,]" *Withrow v. Larkin*, 421 U.S. 46, we see no reason why an administrative adjudicator should be allowed to sit with impunity in a case where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on his impartiality. *State v. Brown*, 70 Haw. at 467 n.3, 776 P.2d at 1188 n.3. "Few situations more severely threaten trust in the [adjudicative] process than the perception that a [party] never had a change because the decisionmaker may have owed the other side special favors." M. Redish & L. Marshall, *supra*, at 483.

B.

The circuit court, after hearing Malcolm Sussel's motion for a preliminary injunction, found no evidence that Commissioners Tagala, Nagy, and Silva were biased against him or that their participation in his civil service appeal would create "an appearance of impropriety." It found "evidence of [Commissioner] Dias' actual bias against Sussel." And it found Commissioner Chairman Miyagi "has known Mayor Frank F. Fasi for many years[,] . . . has contributed to [the mayor's and

the managing director's] fund raiser[s, and] is the president and . . . majority stockholder (70%) of MTL, Inc., a non-profit corporation which is under exclusive contract . . . to provide bus service to the City."

The court concluded "the 'actual bias' standard proposed by the Defendants [was] applicable to the . . . case[,]" rejecting "the 'appearance of impropriety' standard proposed by Sussel[.]" It concluded Mr. Miyagi did "not possess a personal bias or prejudice against Sussel or in favor of the named appellees[.]" Nevertheless, it "believe[d] . . . an appearance of impropriety exist[ed] as to [his] serving on the Commission" and "recommend[ed] that Commissioner Miyagi seriously consider voluntarily recusing himself form hearing Sussel's appeal to avoid even the appearance of impropriety." The court thus enjoined only Commissioner Dias' participation in the civil service appeal.

Upon reviewing the record, we likewise believe Mr. Miyagi's participation in Mr. Sussel's appeal to the commission would create an appearance of impropriety. And since we see no reason why an administrative adjudicator should be allowed to sit with impunity in a case where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on his impartiality, we conclude the circuit court erred in not enjoining Mr. Miyagi's participation therein.

We therefore strike the circuit court's conclusion that an administrative adjudicator is subject to disqualification only upon a showing of actual bias, vacate its interlocutory order, and remand the case for entry of an order consistent with this opinion and for further proceedings not inconsistent therewith.

Charles K.Y. Khim
for appellant, cross-appellee

Jonathan Chun (Alice Fent with him on answering brief),
Deputies Corporation Counsel,
for appellees, cross-appellants

/s/ Herman T. F. Lum
/s/ Edward H. Nakamura
/s/ Frank D. Padgett
/s/ Yoshimi Hayashi
/s/ James H. Wakatsuki

JUSTICES OF THE
HAWAII SUPREME
COURT

APPENDIX 2

UNITED STATES COURT OF
APPEALS FOR THE
NINTH CIRCUIT
FILED August 24, 1989
CATHY A. CATTERSON, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MALCOLM A. SUSSEL, Plaintiff/Appellant/ Cross-Appellees,) vs. CITY AND COUNTY OF HONOLULU, Defendant/Appellees, and FRANK FASI, et al., Defendants/Appellees/ Cross-Appellants.	)	Nos. 89-15652 89-15697 89-15777 89-15778 89-15779 89-15780 DC# CV-86-1136-DAE ORDER

Commencing at 11:00 a.m. on August 4, 1989 pre-briefing conferences were held in person before Conference Attorney Juliet L. Gee. Malcolm Sussel was represented by William Deeley. City and County of Honolulu was represented by Vladimir Devens and Paula Devens. D.G. "Andy" Anderson was represented by Cynthia Thielen. Loretta Fukuda was

represented by Barbara Petrus. George Kekuna was represented by G. Richard Morry and Bruce Wakusawa. Frank Fasi was represented by Steve Nakashima and Lori Aquino.

(1) Appeals Nos. 89-15652 and 89-15697 are consolidated.

(2) Appeals Nos. 89-15777, 89-15778, 89-15779 and 89-15780 are consolidated.

(3) Defendant Anderson will file a motion to dismiss the issue of representation by Attorney Levine for lack of jurisdiction on or before August 21, 1989. Plaintiff will respond on or before August 31, 1989. Defendant will serve plaintiff with a copy of the motion by personal service.

(4) Plaintiff has stipulated to dropping the issue of defamation in exchange for reduced page requirements by the individual defendants.

(5) The briefing schedule is set as follows:

(a) Plaintiff shall file excepts of record and an opening brief of not more than 50 pages on October 6, 1989.

(b) Defendant City and County of Honolulu shall file its answering brief of not more than 40 pages on or before December 5, 1989 and shall join in the briefs of the individual defendants to the extent possible.

(c) The individual defendants shall file their answering/opening briefs on or before December 5, 1989. The individual defendants shall file a joint brief of not more than 50 pages and each defendant may file, if necessary, a supplemental brief regarding their individual differences of no more than 20 pages.

(d) The Plaintiff shall file an answering/reply brief of not more than 55 pages on or before January 10, 1990.

(e) The defendant city may file an answering brief on the issue of representation to the cross appeal on or before January 10, 1990 of not more than 35 pages.

(f) Individual defendants may file a joint reply brief of not more than 25 pages and optional individual supplemental briefs of not more than 10 pages on or before January 31, 1990.

(g) The court Clerk will calendar this appeal for the first available calendar to be heard in Honolulu, Hawaii.

This order is subject to reconsideration by a judge if any objection is filed within 10 days of the entry of the order.

FOR THE COURT:

/s/ Juliet L. Gee

Juliet L. Gee
Conference Attorney